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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONTAINER CORPORATION OF AMERICA,

Appellant,

v.

FRANCHISE TAX BOARD,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF AS AMICI CURIAE IN SUPPORT OF BRIEF OF CONTAINER CORPORATION OF AMERICA

FRANCIS D. MORRISSEY
BAKER & McKENZIE
2700 Prudential Plaza
Chicago, Illinois 60601
(312) 861-2819

Attorney for Amici Curiae,
CANADIAN IMPERIAL BANK OF COMMERCE
HIRAM WALKER RESOURCES LIMITED
INCO LIMITED
MacMILLAN BLOEDEL LIMITED
WAWANESA MUTUAL INSURANCE COMPANY

Of Counsel:

PETER B. POWLES
BAKER & McKENZIE
2800 Prudential Plaza
Chicago, Illinois 60601
(312) 861-2952

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

Whether the allocation of taxable income between the United States and foreign nations for income tax purposes is a subject of such dominant federal interest and responsibility that regulation of the subject must be prescribed by the United States government, to the exclusion of any regulation by individual states; and

Whether world-wide combined reporting for state unitary tax purposes is unconstitutional because it obstructs the prerogative of the United States government to conduct foreign relations.

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Titlow, Richard E., International Double Taxation and the United States, 46 Taxes, The Tax Magazine 135 (1968) 12
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INTEREST OF THE *AMICI CURIAE*

Your *amici* are major Canadian companies engaged in the banking, distilling, nickel mining, forest products, and casualty insurance industries. All conduct the major part of their business activities outside the United States, but have significant business interests in the United States, primarily through American subsidiaries. All are detrimentally affected by world-wide combined reporting, imposed by various states of the United States.

The interest of the *amici* in the instant case arises from the following factors:

i) Their grave concern that if the various states of the United States are permitted to require world-wide combined reporting under varying allocation formulae, subordinate taxing authorities of other countries may adopt similar procedures, thus severely impairing the flow of international commerce;

ii) The irreconcilable problems of multiple taxation that necessarily result from applying different methods of allocating income among the states of the United States and foreign nations;

iii) The absence of any international tax court to resolve problems of multiple taxation and the unconstitutionality of resolving such problems by treaties between foreign nations and the individual states of the United States;

iv) The arbitrary and inaccurate allocation of income, frequently resulting from world-wide combined reporting under the unitary method of apportionment, together with the onerous expense and the diversion of management time required to prove by clear and cogent evidence that an allocation of income is totally disproportionate;

v) The substantial compliance problems that confront your *amici* who are required to gather and present, in varying state-required formats, world-wide financial data, which must be converted into United States currency in the context of constantly fluctuating exchange rates and presented in accordance with local state income tax principles.

Your *amici* are not concerned with the use of combined reporting for a unitary enterprise within the United States. They are very concerned with international use of world-wide combined reporting by various states of the United States.

SUMMARY OF ARGUMENT

The allocation of income and related expense between the United States and other nations for income tax purposes is so integral to the conduct of foreign relations that it constitutes a field of dominant federal interest, prohibiting any state regulation. This dominant federal interest precludes world-wide combined reporting and apportionment of taxable income by the unitary method because this procedure not only conflicts with the established federal "arm's length-independent entity" method of allocation but also prejudices the conduct of foreign relations.

World-wide combined reporting in compliance with the unitary method is totally inconsistent with the internationally accepted "arm's length-independent entity" principle. The multiple taxation that inevitably arises imposes burdens on international commerce that are impermissible under the Commerce Clause.

Multi-national enterprises are denied due process at the international level because no international tax court or administrative procedures exist to resolve the multiple taxation arising from the conflict between world-wide combined reporting and the unitary method of apportionment as used by certain states of the United States and the "arm's length-independent entity" principle applied by all industrialized foreign nations. At the federal level, "competent authority" procedures to avoid double taxation have been established by tax treaties with those foreign nations that constitute the major trading partners of the United States. Some measure of due process is thus afforded under the federal scheme.

The problems of state involvement in foreign relations, multiple taxation and lack of due process would cease to exist if this Court were to prohibit state allocation of a greater amount of taxable income to the United States than is permitted by international tax treaties of the United States or the Internal Revenue Code of the United States.

World-wide combined reporting is unnecessary since the United States Internal Revenue Service establishes the fair share of global income subject to original taxing jurisdiction in the United States in accordance with the tax treaties of the United States and the Internal Revenue Code. The states can apply their apportionment formulae to this fair share of global taxable income already apportioned to the United States. Further, given stringent United States enforcement of tax treaties and the tax avoidance provisions of the Internal Revenue Code, world-wide combined reporting is not required to prevent tax avoidance.

ARGUMENT

I.

THE ALLOCATION OF TAXABLE INCOME BETWEEN NATIONS IS A FIELD OF SUCH PRIMARY FEDERAL INTEREST AND IS SO CLOSELY INVOLVED WITH THE CONDUCT OF FOREIGN RELATIONS THAT ANY STATE REGULATION OF THIS SUBJECT IS CONSTITUTIONALLY BARRED UNDER THE COMMERCE CLAUSE AND THE SUPREMACY CLAUSE.*

When called upon to constrain state infringement of the exercise of federal authority, this Court has returned repeatedly to its statement that:

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* U.S. CONST. Art. I, § 8, cl. 3 and Art. VI, cl. 2.

> "The United States is not only a Government, but it is a national Government, and the only Government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all which are forbidden to the state governments."

Chae Chan Ping v. United States, 130 U.S. 581, 605 (1889); *See also Knox v. Lee*, 79 U.S. 457, 555 (concurring opinion) (1870).

States exceed their constitutional power in our federal system when they attempt to regulate commerce among nations, particularly when such regulation affects the conduct of foreign relations. This Court recently reiterated in *Japan Line, Ltd. v. County of Los Angeles*, the long-accepted constitutional doctrine that:

> "'[T]he commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce. . . . [I]n such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests."

441 U.S. 434 at 454, quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

In functioning as such an arbiter, this Court has been keenly sensitive to the federal government's need to "speak with one voice when regulating commercial relations with foreign governments," *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976); to the potential magnitude of repercussions that could be precipitated by "real or imagined wrongs to another's subjects inflicted, or permitted, by a government," *Zschernig v. Miller*, 389 U.S. 429, 441 (1968); and to the likelihood that any adverse response provoked by state interference in matters of foreign affairs would be directed at the United States rather than toward any individual state or locality, *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1876).

If the allocation of taxable income between nations for state income tax purposes is a "matter of local concern [that] is local in character and effect," insignificantly impacting upon foreign commerce, and if the incentive to deal with the subject nationally is slight, state regulation of this field should be held constitutional; otherwise it is unconstitutional. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767. Your *amici* respectfully submit that world-wide combined reporting in pursuance of the unitary method of taxation cannot be regarded as a "local concern" nor one "local in character and effect."

Indeed, protests by many of our nation's major trading partners demonstrate that international applications of state-imposed unitary apportionment methods are "inimical to the national commerce." 325 U.S. at 769. Almost universally, foreign governments and corporations perceive the international application of state unitary apportionment schemes as unjustified attempts by individual states to extend their taxing power beyond the territorial boundaries of the United States.* The Italian government, on its own behalf and on behalf of nine EEC governments, expressed this concern as follows:

> "Our Governments are concerned about the application to US subsidiaries of foreign companies of the unitary basis of taxation as applied in California and in varying degrees by certain other States. . . .

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* Anger at what is perceived to be extra-territorial foreign taxation can be a United States, as well as a foreign sentiment. This is vividly demonstrated by the experience between the United States and France in the late 1920's. The French took a view that state world-wide combined reporting enthusiasts might well understand, arguing that dividends or interest paid by United States corporations, in part out of income from French operations, were to that extent French source income, subject to French securities taxes. Complaints about extra-territorial taxation by the French flooded the State Department. International consultations were held. Ultimately, the United States' first bilateral Tax Convention was signed on April 27, 1932. Under the Convention, France abandoned her security tax.

> *This method is incompatible with the principles accepted by all OECD member [countries] and recommended to all [countries] as a basis for the taxation of subsidiaries or permanent establishments of foreign enterprises.* These principles require that a subsidiary should be taxed only on the profits it actually has made, provided that these are based on dealing at 'arm's length' between the subsidiary and related enterprises." (Emphasis added.)*

The British government has stressed the risk of continued state interference with pre-existing federal policy concerning the allocation of income between nations, emphasizing the destructive impact of such interference on prior international agreements and the adverse effect of such state action on otherwise attainable goals of international cooperation.

> "Unless common rules for determining the allocation of profits between different taxing jurisdictions are followed internationally *it will be impossible to preserve the essential objective of providing a consistent and coherent international tax framework for business and investment*, for which the United States and the United Kingdom have striven together with their fellow members of the Organization for Economic Co-operation and Development. It is the view of Her Majesty's Government that *the unitary basis*, which is not a practical international alternative to the 'arm's length' basis, *could undo the important and patient international work that has been achieved in regulating international tax practices*, and that every effort is required to discourage the use [or] the extension of that basis." (Emphasis added.)**

In connection with the new Income Tax Treaty with Canada signed September 26, 1980, the Deputy Prime

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* *State Taxation of Foreign Source Income: Hearings on H.R. 5076 Before the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 360 (1980).

** *Press Release by British Information Department, Reprinted in Hearings on H.R. 5076 Before the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 317 (1980).

Minister and Minister of Finance for Canada, Allan J. MacEachen, by letter dated September 26, 1980, advised the United States Treasury that:

> "It is the position of Canada that the so-called 'unitary apportionment' method used by certain states of the United States to allocate income to United States offices or subsidiaries of Canadian companies results in inequitable taxation and imposes excessive administrative burdens on Canadian companies doing business in those states. . . . Canada continues to be concerned about this issue as it affects Canadian multi-nationals."*

In the face of such undeniable international complaints, the United States Department of State has expressly categorized the issue of international income apportionment as a subject for resolution through the only constitutional mechanism for formulating international agreements—the exercise of the treaty power of the United States government. In his letter transmitting the 1975 Income Tax Treaty between the United States and the United Kingdom to the President, C. W. Robinson, acting Secretary of the Department of State reported:

> "The [state unitary] method of assessment, which includes the burden of producing worldwide records of all of the affiliated companies, has raised many objections by our treaty partners and we are now seeking to deal specifically with this problem in our treaties."**

State regulation that impacts upon foreign relations or jeopardizes the power of the United States government to deal comprehensively with international problems must be invalidated. This Court thus held in *Zschernig v. Miller*, 389 U.S. 429, when presented with a state statute that had received far less international attention than has

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* *See* CCH Tax Treaties, Vol. 1, ¶1317P (1980).

** *See* CCH Tax Treaties, Vol. 2, ¶8103DC at 8107-29 (1976).

world-wide combined reporting for unitary tax purposes. Invalidating an Oregon statute that had limited the right of East German residents to inherit from a decedent resident in Oregon, this Court concluded that the Oregon statute was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and to the Congress." *Id.* at 432.

Zschernig is consistent with this Court's holdings that state legislation must be held unconstitutional when it "is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941). This Court has never required a comprehensive scheme of federal regulation as a prerequisite to invalidating state interference in an area of exclusive federal concern.

As in *Zschernig*, wherein this Court relied on no federal descent statutes to invalidate the state scheme, invalidation of state regulation in the instant case does not require a finding that the federal government has either exhausted, or begun to exercise, its regulatory powers over the international allocation of taxable income. The subject matter and its need for uniform treatment trigger the need for federal control, regardless of the extent of federal exercise of that control. *See Southern Pacific Co. v. Arizona*, 325 U.S. 761.

In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, this Court found that taxation of the instrumentalities of international commerce was a direct regulation of such commerce, requiring uniformity of approach and centralization of authority, and, therefore, held that such power was exclusively vested in the United States government. Similarly, the instant case presents an issue of critical international importance, which, although not yet entirely regulated by treaties, is vital to the

maintenance of both international trade and international relations.

The division of income and taxing power is at the core of virtually every federal income tax treaty negotiated by the United States. State regulation of international income allocation has precipitated a level of international frustration and complaint that should forewarn those who would ignore this Court's admonition in *Japan Line* that:

> "The risk of retaliation . . . is acute, and such retaliation of necessity would be felt by the Nation as a whole. . . . California, by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade."

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. at 453.

That Congress has not enacted legislation restricting combined reporting to the territorial limits of the United States and that efforts to do so through the treaty-making power were denied ratification* does not render constitutional state regulation that was inherently unconstitutional from the outset. When a field is one of exclusive federal interest and responsibility, the states have no constitutional power to intervene. Concurrent state regulation cannot be tolerated. Even when the United States government has not acted, state conduct that is inimical to the national commerce or disrupts the conduct of foreign relations is unconstitutional. Your

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* See letter of September 26, 1980, from G. William Miller, Secretary of the Treasury, to Allan J. MacEachen, Deputy Prime Minister and Minister of Finance for Canada, CCH Tax Treaties, Vol. 1, ¶1317P. The unitary method of apportionment was not an international problem until 1970-1975; consequently, earlier tax treaties did not attempt to deal with this issue. The states that created the problem then frustrated an attempted treaty solution rather than remove the problem by limiting combined reporting to the United States.

amici submit that world-wide combined reporting is both inimical to the national commerce and disruptive of the conduct of foreign relations.

State regulation of international income tax matters, which regulation is impermissible under the constitutional division of power between the United States government and the various states, does not become constitutional merely because the United States government has not acted or because individual states through their Senators refuse to ratify an income tax treaty intended to prohibit such regulation.

II.

STATE INCOME TAX APPORTIONMENT FORMULAE MUST REACH RESULTS CONSISTENT WITH INTERNATIONAL INCOME TAX TREATIES.

Your *amici* urge this Court to hold, as a minimum, that a state apportionment formula, if used consistently by all states in relation to a particular foreign country, must not allocate to the United States any greater amount of taxable gross income, or lesser amount of expense related to that income, than is permitted or required by any United States income tax treaty with that country. When the severity of international tax problems has prompted the United States government to negotiate an income tax treaty with a country, the dominant federal interest is clear.* The United States has negotiated such treaties with approximately forty nations, creating a comprehensive framework of understandings, between the United States and other countries, regarding the means by which taxable income will be allocated among them. Individual state assertions of the power to allocate income by means other than those used in treaties in-

* Since state income taxes are deductible for federal income tax purposes, an adverse effect on federal revenue results whenever world-wide combined reporting allocates more income to the United States than is allocated by the United States Internal Revenue Code.

evitably undermine such understandings and expectations. The problem becomes increasingly acute as the more commercially significant states of the United States adopt world-wide combined reporting, often after a tax treaty has been negotiated.

Foreign governments cannot enter into treaties with individual states; they must rely upon the United States government's authority in negotiating trade policies. To permit as many as fifty independent state assertions of taxing authority over international commerce would frustrate the United States government's attempts to speak with one voice in negotiating agreements dealing with international trade, investment, and financing. This Court is respectfully urged to reaffirm the exclusive authority of the United States in this field.

As this Court held in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), the need for, as well as the existence of, a uniform federal policy is imperative. Only this Court can ensure that state law does not frustrate the effectuation of that uniform federal policy.

This Court's opinion in *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*, 266 U.S. 271 (1924), does not deny the need to preclude state interference in the allocation of taxable income between nations. *Bass, Ratcliff* was decided on facts arising in 1918, only five years after income taxation had been instituted in the United States. The United States had not yet entered into any income tax treaties with foreign nations and did not do so until the first treaty with France in 1932.* Conflicts between state income apportionment formulae and the provisions of treaties, the consequent adverse effect on foreign relations, and risks of international multiple taxation were not considered in *Bass, Ratcliff* because they did not exist or were not yet perceived as

* *See* Richard E. Titlow *International Double Taxation and the United States*, 46 Taxes, The Tax Magazine 135 (1968).

national problems. This Court has never, however, failed to update constitutional interpretation to meet the needs of changed circumstances—in this case, the enormous growth of international trade, investment, and financial transactions since World War II, making necessary numerous international tax treaties.

Under the current United States-United Kingdom Income Tax Treaty, if Bass, Ratcliff had not had federal taxable income, under the proposition advocated by your *amici*, Bass, Ratcliff would probably also have had no taxable income in the State of New York. However, once income and expense attributable to the United States had been ascertained under the treaty provisions, New York could have calculated a profit on the New York state income tax return by denying a deduction otherwise allowable on the federal return. In such a situation, while the state and federal tax results would not be consistent, no state interference in the treaty allocation of income *among nations* would occur. This result would be consistent with the constitutional allocation of foreign commerce power exclusively to the United States.

In the converse of *Bass, Ratcliff*, with an American company selling ale in the United Kingdom through a branch established there, the current Income Tax Treaty between the United Kingdom and the United States would permit the United States government to include, for federal income tax purposes, all income and expenses of the United Kingdom branch. The approach urged by your *amici* would allow a state of the United States to include in its apportionment all British income, sales, property, and payroll, because the income and expense incurred in England could be taken into account for federal income tax purposes under the treaty.

III.

WORLD-WIDE COMBINED REPORTING IS UNNECESSARY FOR STATE INCOME TAX PURPOSES.

Conflicting state and national assertions of power to allocate taxable income may be reconciled by applying state unitary apportionment formulae only to that quantum of taxable income that is allocated to United States sources pursuant to international tax treaties of the United States and the Internal Revenue Code of the United States. Since most states use federal taxable income as the starting point for computing state income taxes, this limitation is practical, as well as fair.

Tax treaties and the regulations under Section 482 of the Internal Revenue Code use the "arm's length-independent entity" principle to allocate income and expense not only between the components of a "unitary" business, but also between all entities under "common control."* Section 482 governs a wider range of situations than those intended by the unitary principle. The federal approach is based on the concept of "com-

* "The purpose of section 482 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer, by determining, according to the standard of an uncontrolled taxpayer, the true taxable income from the property and business of a controlled taxpayer. The interests controlling a group of controlled taxpayers are assumed to have complete power to cause each controlled taxpayer so to conduct its affairs that its transactions and accounting records truly reflect the taxable income from the property and business of each of the controlled taxpayers. If, however, this has not been done, and the taxable incomes are thereby understated, the district director shall intervene, and, by making such distributions, apportionments, or allocations as he may deem necessary of gross income, deductions, credits, or allowances, or of any item or element affecting taxable income, between or among the controlled taxpayers constituting the group, shall determine the true taxable income of each controlled taxpayer. *The standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer.*" (Emphasis added.) Treasury Regulation 1.482-1(b)(1).

mon control," a test easier to apply than the inquiry required to determine whether a business is "unitary." The results achieved are also more precise than the often rough approximations necessitated by mechanical application of mathematical formulae to combined income.

Internal Revenue Service procedures under Section 482 of the Internal Revenue Code and the regulations promulgated thereunder include in United States gross income all amounts properly attributable to United States sources, allocating to foreign sources all expenses not properly attributable to United States sources and denying United States deductions for those expenses. The result maximizes taxable income in the United States.

The detailed and sophisticated rules applied by the Internal Revenue Service govern, for example, the imputation of interest on otherwise interest-free loans; the appropriate charges by a United States parent company to its foreign subsidiary for use of managerial, technical, or financial services or for royalties on patents or trademarks; and the calculation of a fair price for goods sold between a parent and its subsidiary. Although difficult to apply in some instances, when the rules are applied, they focus on economic realities, and their application can be dealt with item by item at the audit level. These precise results render unnecessary the rough approximations of formulary apportionment.

When the United States government has performed the task of allocating taxable income and expense to the United States, no need exists for totally different apportionment formulae nor for imposing on taxpayers the additional expense and diversion of management time required to prove by clear and cogent evidence that the state allocation of income is totally disproportionate.

The states argue that apportionment of income by the unitary method is essential to prevent taxpayers from manipulating separate geographical accounting and from distorting taxable income, and also because an army of state revenue agents would be required to enforce the "arm's length-independent entity" method. These considerations are totally irrelevant in the international context, because the task of allocating a fair share of global taxable income and expense to the United States is performed routinely every year by the Internal Revenue Service, and its Office of International Operations which was created for this express purpose.

To avoid misallocation of income and expense and to effect compliance with tax treaties and domestic tax law, the tax authorities of the United States and foreign governments also exchange tax information. Moreover, the Internal Revenue Service has "simultaneous examination programs" with Canada, Germany, France, and the United Kingdom, providing for the separate but simultaneous audit of the same multi-national enterprise. In addition to Section 482 of the Internal Revenue Code and these audit procedures, the "foreign personal holding company" and "Sub-Part F" provisions of the Internal Revenue Code* include within United States taxable income the earnings of foreign subsidiaries in tax haven countries.

With such comprehensive regulation by the federal government, state systems for world-wide combined reporting cannot be justified by any alleged need to prevent tax avoidance. Moreover, with approximately seventy to seventy-three percent of investment flowing from the United States to Japan, Canada, and European countries whose corporate income tax rates nearly all equal or exceed those in the United States,

* I.R.C. §§551-58, 951-64.

and with eighty-eight percent of foreign source investment originating in those same countries, shifting of income out of the United States tends to increase, rather than to reduce, tax rates.*

In summary, your *amici* contend that state-imposed world-wide combined reporting cannot be justified as a necessary evil that is required to eliminate or reduce tax avoidance.

IV.

WORLD-WIDE COMBINED REPORTING AND THE UNITARY METHOD OF APPORTIONMENT FREQUENTLY PRODUCE MULTIPLE TAXATION, THUS IMPOSING IMPERMISSIBLE BURDENS ON INTERNATIONAL COMMERCE.

As this Court noted in *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 255-56 (1938), unconstitutional multiple taxation arises where the tax burdens are of:

> "[S]uch a nature as to be capable, in point of substance, of being imposed . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

Combined reporting ignores the individual commercial realities of particular corporate branches and subsidiaries, apportioning combined income on the basis of factors such as sales, property, and payroll. World-wide combined reporting assumes that a dollar of sales, property, and payroll in one country will produce approximately the same amount of income in any other country. Although arguably true as between the states of the United States, this assumption ignores interna-

* U.S. and OECD statistics are approximately the same. See, *e.g.*, United States Department of Commerce, Bureau of Economic Analysis, Vol. 61, No. 8, *Survey of Current Business* (1981) 21, 41; OECD, *International Investment and Multinational Enterprises—Recent International Direct Investment Trends*, (1981) 103, 105.

tional realities. Varying economic conditions and profitability levels in different countries ensure that world-wide combined reporting and the "arm's length-independent entity" method will produce substantially different results on the same facts. These differences are often exacerbated by currency values fluctuating internationally by up to twenty percent or more in any year.

Whenever combined reporting and the unitary method of apportionment allocates to the United States a greater amount of taxable income than the "arm's length-independent entity" method, multiple taxation inevitably follows because foreign nations do not correspondingly decrease the amount of taxable income allocated to them by the latter method.

V.

THE STATES CANNOT PROVIDE DUE PROCESS TO ENTERPRISES SUBJECT TO INTERNATIONAL DOUBLE TAXATION.

Within the United States, this Court can prevent multiple taxation arising from conflicting methods of allocation of taxable income between the states, thereby insuring fundamental fairness to the taxpayer. Conflicts between world-wide combined reporting and the "arm's length-independent entity" approach, resulting in multiple taxation at the international level, cannot be resolved either by this Court or by any other court. No international tax court or administrative procedures exist to resolve conflicts in allocation of taxable income between individual states and foreign nations. In the absence of a forum in which he can be heard, the taxpayer can have no due process.* Asking the courts of the individual state or foreign nation to resolve the conflict is ineffective as each must be guided by its domestic law. An allocation of income by the unitary method may not be sufficiently disproportionate to require it to be set aside as a denial of due process, and yet such an alloca-

* Required by U.S. CONST. amend. V.

tion is frequently totally different in result from the "arm's length-independent entity" method.

States cannot defend the resulting multiple taxation by alleging that such multiple taxation is the fault of foreign nations that use the "arm's length-independent entity" method. It is not the prerogative of an individual state of the United States to tell a foreign nation that it should deviate from accepted international practice and subordinate the "arm's length-independent entity" method of allocation to the unitary method.* Further, the absence of any international tax court with jurisdiction to hear such questions emphasizes the need for international tax treaties to establish the administrative review procedures necessary to resolve such conflicts and the need to require the individual states of the United States to adhere to the constitutional scheme that vests the United States government with exclusive power to conduct international relations.

If individual states were required to apply their apportionment formulae and individual tax rules to gross income and expense allocable to the United States in accordance with federal tax treaties and the Internal Revenue Code, taxpayers would be afforded some measure of due process. The international tax treaties of the United States provide that when conflicting allocations of income and expense occur between two countries, the taxpayer has a right to require the "competent authorities" (as defined in the tax treaty) of each country to meet and reconcile conflicts.

Such procedures are not applicable to double taxation caused by state deviation from accepted international methods of allocating income. Foreign nations and their taxpayers cannot constitutionally enter into treaties with

* This is the position taken by California in its Defendant's Reply to Plaintiff's Opposition Brief in *Alcan Aluminum Ltd. v. The Franchise Tax Board of the State of California*, United States District Court, Southern District of New York, 81 Civ. 3911 (L.W.P.) page 18.

individual states to establish procedures for solving such conflicts. Your *amici*, therefore, respectfully request a remedy from this Court.

CONCLUSION

Your *amici* urge this Court to hold that state apportionment formulae must not allocate to the United States any greater amount of taxable income or lesser amount of expense than is permitted or required by the international tax treaties and Internal Revenue Code of the United States.

This result is dictated by the need for this nation to speak with one voice in international affairs. This need cannot be met if the issue of international income allocation remains susceptible to the parochial preferences of up to fifty different states.

Respectfully submitted,

FRANCIS D. MORRISSEY
BAKER & McKENZIE
2700 Prudential Plaza
Chicago, Illinois 60601
(312) 861-2819

Attorney for Amici Curiae,
CANADIAN IMPERIAL BANK OF COMMERCE
HIRAM WALKER RESOURCES LIMITED
INCO LIMITED
MacMILLAN BLOEDEL LIMITED
WAWANESA MUTUAL INSURANCE COMPANY

Of Counsel:
PETER B. POWLES
BAKER & McKENZIE
2800 Prudential Plaza
Chicago, Illinois 60601
(312) 861-2952